

**OPEN RECORDS AND MEETINGS OPINION
2003-O-15**

DATE ISSUED: October 22, 2003

ISSUED TO: Shawn Dobberstein, Manager, Fargo Airport Authority

CITIZEN'S REQUEST FOR OPINION

On June 18, 2003, this office received a request for an opinion under N.D.C.C. § 44-04-21.1 from Al Aamodt, on behalf of WDAY news and the Fargo Forum newspaper, asking whether the Fargo Airport Authority violated N.D.C.C. §§ 44-04-19 and 44-04-19.2 by holding an executive session that was not authorized by law and by failing to follow the necessary procedure to hold an executive session.

FACTS PRESENTED

The Fargo Airport Authority met on June 17, 2003. All five commissioners of the Airport Authority were present. One item on the agenda was whether to reopen a viewing park. The viewing park is a place where the public can go to watch planes take off and land. The viewing park had previously been closed, and the commissioners were considering whether to reopen it. Drew Wrigley, the United States Attorney for North Dakota, and Bruce Towers, with the Federal Transportation Security Administration (hereafter, "TSA") were present to provide testimony regarding reopening of the viewing park. Mr. Wrigley encouraged the commissioners to view a PowerPoint presentation provided by Bruce Towers before making their decision. Both Mr. Wrigley and Mr. Towers expressed concern that the commissioners not view the PowerPoint presentation in the presence of the public. After some discussion, Commissioner Pawluk requested that Chairperson Clark and another commissioner, General Macdonald, view the PowerPoint presentation and report back to the rest of the commissioners. The commissioners then took a five-minute recess. Chairperson Clark and General Macdonald then went into a separate room with Mr. Wrigley and Mr. Towers to view the presentation.

Upon request of our office, the attorney for the Airport Authority spoke with Chairperson Clark and General Macdonald to discover what transpired after they went into the separate room with Mr. Towers and Mr. Wrigley. The attorney indicated that Mr. Towers presented the PowerPoint presentation on a laptop computer, which took approximately four to five

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minutes. After viewing the PowerPoint presentation, the two commissioners left the room, having made no comment on the PowerPoint presentation. The commissioners also indicated that no conversation took place during the viewing of the PowerPoint presentation.

The meeting of the Airport Authority then resumed. Mr. Wrigley stated he was available for further questions and Mr. Towers had nothing more for the commissioners. After another person addressed the Airport Authority, Commissioner Pawluk asked General Macdonald for his recommendation. While General Macdonald did not disclose the substance of the PowerPoint presentation, he did recommend that the viewing park be reopened provided certain precautions were implemented. General Macdonald made a motion to reopen the viewing park after a gate and proper signage were installed and hours were set for the viewing park. The motion was seconded and approved unanimously by the commissioners. Soon thereafter, the meeting was adjourned.

ISSUES

1. Whether the two members of the Fargo Airport Authority who viewed the PowerPoint presentation constituted a committee of the Fargo Airport Authority, whose meeting was subject to the open meetings laws.
2. If the two members constituted a committee, whether the proper procedures were followed to hold the executive session to view the PowerPoint presentation.
3. If the two members constituted a committee, whether there was legal authority to hold the executive session to view the PowerPoint presentation.

ANALYSES

Issue One

A “governing body” of a “public entity” includes “any group of persons, regardless of membership, acting collectively pursuant to authority delegated to that group by the governing body.” N.D.C.C. § 44-04-17.1(6), (12). Thus, committees set up by governing bodies are subject to the open records and meetings laws. See N.D.A.G. 2001-O-11 (meetings of the executive committee of Fargo-Cass County Economic Development Corporation are subject to open meetings laws).

A review of the tape recording and minutes of the Fargo Airport Authority meeting indicates that the Airport Authority was attempting to find a way to have at least some of its

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members view the PowerPoint presentation in private. Commissioner Pawluk stated in the meeting he wanted Chairperson Clark and General Macdonald to view the presentation and report to the other commissioners. A recess was then taken. In my opinion, by this process, the Airport Authority formed a committee and delegated authority to Chairperson Clark and General Macdonald to view the presentation and report back to the commissioners. Thus, the committee was subject to the open meetings laws and needed to follow the procedures in N.D.C.C. § 44-04-19.2 to go into an executive session.

Issue Two

An executive session may be held if, among other things:

- a. The governing body first convenes in an open session and, unless a confidential meeting is required, passes a motion to hold an executive session;
- b. The governing body announces during the open portion of the meeting the topics to be discussed or considered during the executive session and the body's legal authority for holding an executive session on those topics;
- c. The executive session is recorded

N.D.C.C. § 44-04-19.2(2). These procedures were not followed. No legal authority was announced during the open portion of the meeting that would authorize the executive session to be held. The executive session was not recorded. It is my opinion that the Airport Authority failed to comply with the requirements found in N.D.C.C. § 44-04-19.2 in order to hold an executive session.

Issue Three

A governing body may hold an executive session to consider or discuss closed or confidential records. N.D.C.C. § 44-04-19.2. A closed record is "all or part of an exempt record that a public entity, in its discretion, has not opened to the public." N.D.C.C. § 44-04-17.1(2). A confidential meeting or record means "all or part of a record or meeting that is either expressly declared confidential or is prohibited from being open to the public." N.D.C.C. § 44-04-17.1(3). A law making a record exempt or confidential includes federal statutes, applicable federal regulations, and state statutes. N.D.C.C. § 44-04-17.1(7). The legal authority for holding an executive session must be cited in the open part of the meeting before an executive session is held. N.D.C.C. § 44-04-19.2(2)(b). No legal authority was cited before holding the executive session.

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This office requested the legal authority used as a basis for holding an executive session. The Fargo Airport Authority's attorney referred our office to 6 U.S.C. § 482 as a potential federal law that may authorize the PowerPoint presentation to be closed or confidential. This federal law simply indicates that the President shall prescribe and implement procedures under which federal agencies may share homeland security information with appropriate state and local personnel. However, this federal law does not in itself make the PowerPoint presentation closed or confidential.

Before the 2003 legislative session, nothing in state law would have exempted the PowerPoint presentation. In 2003, the State Legislature passed two statutes to address security issues: N.D.C.C. §§ 44-04-24 and 44-04-25. Under section 44-04-26 portions of a meeting "which would reveal a security system plan" are exempt from the open meetings laws. A security system plan is defined to include:

all records, information, photographs, audio and visual presentations, schematic diagrams, surveys, recommendations, communications, or consultations or portions of any such plan relating directly to the physical or electronic security of a public facility, or any critical infrastructure, whether owned by or leased to the state or any of its political subdivisions, or any privately owned or leased critical infrastructure if the plan or a portion of the plan is in the possession of a public entity; threat assessments; vulnerability and capability assessments conducted by a public entity, or any private entity; threat response plans; and emergency evacuation plans.

N.D.C.C. § 44-04-24(2)(b).

Both statutes were passed as emergency measures and were in effect at the time of the Fargo Airport Authority meeting. Fargo Airport Authority did not offer these new statutes as legal authority for exempting the PowerPoint presentation. This office requested a copy of the PowerPoint presentation, but was unable to obtain it because it was in the possession of TSA which would not release it. Therefore, this office cannot independently determine whether the PowerPoint presentation was exempt under section 44-04-24.

Thus, it is my opinion that no legal authority has been provided under which the PowerPoint presentation could have been viewed in a closed or confidential executive session.

CONCLUSIONS

1. It is my opinion that the two members of the Fargo Airport Authority who viewed the PowerPoint presentation constituted a committee of the Fargo Airport Authority, whose meetings were subject to the open meetings laws.

2. It is my opinion that the proper procedures were not followed to hold the executive session to view the PowerPoint presentation.
3. It is my opinion that no legal authority has been provided to hold the executive session to view the PowerPoint presentation.

STEPS NEEDED TO REMEDY VIOLATIONS

The Fargo Airport Authority must hold a meeting preceded by proper public notice under N.D.C.C. §44-04-20 at which it announces its legal authority for holding the executive session it held on June 17, 2003. "A governing body may hold an executive session to consider or discuss closed or confidential records." N.D.C.C. § 44-04-19.2(1). Thus, if the Airport Authority can identify law, as defined in N.D.C.C. § 44-04-17.1(7), authorizing the PowerPoint presentation to be closed, such authority will be sufficient for holding the executive session it held on June 17, 2003.

If the Airport Authority is unable to identify and announce the legal authority for the executive session, Chairperson Clark and General Macdonald must state what they saw during the PowerPoint presentation and how it affected their decision or advice regarding reopening of the viewing park.

Failure to issue within seven days of the date this opinion a written notice under N.D.C.C. § 44-04-20 of the meeting described above will result in mandatory costs, disbursements, and reasonable attorney fees if the person requesting the opinion prevails in a civil action under N.D.C.C. §44-04-21.2. N.D.C.C. §44-04-21.1(2). It may also result in personal liability for the person or persons responsible for the noncompliance. Id.

Wayne Stenehjem
Attorney General

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